No. 94-1097

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

JOAN V. HARRIS,

*Petitioner,*

—v.—

PAUL HIRSH,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

An employee's defamation suit concerning a supervisor's alleged accusation in the course of a workplace investigation was held preempted by the federal Railway Labor Act ("RLA").

1. Where petitioner proposed to meet her evidentiary burden with proof that her supervisor's conduct contravened the collective bargaining agreement covering her employment, is petitioner's claim correctly held preempted under even the narrowest interpretation of preemption under the *Lueck/Lingle/Hawaiian Airlines* standard, such that this case presents no issue worthy of this Court's review?

2. Should this Court accept this case to test the outer parameters of federal labor preemption, notwithstanding the absence of any occasion to do so in light of the New York Court of Appeals' findings that:

(a) "the jury here was required to specifically determine whether defendant's conduct was qualifiedly privileged under the labor contract and whether he exceeded the scope of that privilege";

(b) "plaintiff's theory that defendant's reliance upon his own observations here constituted malice could well be seen as unsustainable in light of the terms of the agreement which permit such conduct";

(c) the jury's verdict "trespassed upon the exclusive authority of the adjustment board to determine the manner in which an employer may enforce company policies";

(d) "plaintiff's tort action constituted a preempted 'disguised' contract claim"; and

(e) "[t]he risk to be avoided by the provisions for the board's exclusive jurisdiction – that a State court ruling may be inconsistent with a Federal adjustment board determination on the same employment issue – is present here"?

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## COUNTER-STATEMENT OF THE CASE

Petitioner was employed by Metro-North Commuter Railroad, and the terms and conditions of her employment were governed by a collective bargaining agreement. (Petition Appendix ("Pet.") 1a) On July 16, 1986, petitioner's department head, respondent Hirsh, called petitioner into his office to discuss her work performance. (Pet. 1a-2a) He suspected petitioner was using drugs because he had seen her acting erratically and had previously observed her give an "incoherent" answer to a co-worker. In the presence of her two immediate supervisors, respondent inquired whether petitioner had a problem and whether she was taking drugs. (Pet. 2a) Although petitioner quickly persuaded respondent that she did not use drugs, and he did not take any action whatever against her, petitioner nonetheless sought redress through the grievance procedures set out by her collective bargaining agreement, and also brought this action for common-law defamation, which respondent unsuccessfully moved to dismiss on the jurisdictional ground that it was preempted by the mandatory arbitration provisions of the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA"). (Pet. 2a-3a)

Eight years later – after a full trial in which the jury "had to second guess whether respondent Hirsh conducted the investigation of petitioner within the dictates of the labor agreement" (Pet. 8a) on its way to a verdict for petitioner of $1.2 million – the New York Court of Appeals agreed with the intermediate appellate court and affirmed dismissal of the action, concluding that petitioner's defamation claim was essentially a "disguised contract claim" (Pet. 9a) and was thus preempted by federal labor law. (Pet. 8a-9a)

**A. The Facts**

The grievance that formed the basis for this action arose when respondent Hirsh, pursuant to his duties with respect to "Rule G" – an industry-wide rule prohibiting substance abuse[1] – called petitioner into his office to question her about deteriorating performance he had directly observed (Pet. 1a-2a, A 362-69), and to determine whether she had a problem for which she might receive help from Metro-North's Employee Assistance Program ("EAP").[2] As a supervisor in the Transportation Department, Hirsh was required to enforce Rule G, which included informing his subordinates about Rule G and Metro-North's substance abuse policy and the availability of EAP for help with substance abuse and other problems that might affect an employee's work performance. (A 428-29)

It is longstanding industry practice to rely upon supervisory observation as a means of enforcing Rule G.[3] At Metro-North, this practice is embodied in a written substance abuse policy (A 50) that is part of the collective bargaining agreement

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[1] *See generally Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 314-15 (1989) ("*Conrail*").

[2] "A___" refers to page numbers of the Appendix submitted in the Court of Appeals.

[3] *See, e.g., Conrail*, 491 U.S. at 315 (Conrail relied "chiefly on supervisory observations to enforce Rule G"); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 607-08 (1989) (Rule G is "enforced, in various formulations, by virtually every railroad in the country"; prior to the use of drug testing, railroads "rel[ied] on observation by supervisors and co-workers to enforce the rule"); *Railway Labor Executives' Ass'n v. Port Authority Trans-Hudson Corp.*, 695 F. Supp. 124, 126-27 (S.D.N.Y. 1988) (practice at PATH and Metro-North is to enforce Rule G by "supervisory observation"), *injunction dissolved*, 759 F. Supp. 1019 (1990).

("CBA") between Metro-North and petitioner's union.[4] The Metro-North policy provides that Rule G is to be enforced in part by supervisory observations of performance and behavior (A 44), inquiries of employees (A 41), and confidential reference to EAP of employees suspected of having a substance abuse problem. (A 41)

Respondent, a manager with 20 years' experience, made certain firsthand observations of petitioner, among them seeing her in a state that he considered incoherent and that one of her own witnesses characterized as "babbling." (A 596) Respondent reviewed his concerns with two other supervisors, who had a different view (although none of the three could be certain), and only then called petitioner into a meeting with those two supervisors to inquire whether she had a problem that might be aided by Metro-North's EAP. Drugs were mentioned only when petitioner repeatedly asked respondent what problem he thought she had. (A 543-44) No one else was present, and respondent made no announcement in the workplace concerning the meeting.

**B. The Proceedings Below**

*(a) Lower Court Proceedings*: Following discovery, respondent moved for summary judgment on the ground that, *inter alia*, his alleged statement was qualifiedly privileged under New York common law and that petitioner could not prove malice sufficient to overcome the privilege. The trial court granted that motion, but the Appellate Division reversed and remanded, holding that petitioner had presented sufficient evidence to raise a jury question as to whether respondent had abused the qualified privilege. (Pet. 18a) ("*Harris I*").[5]

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[4] *See Railway Labor Executives' Ass'n v. Port Auth. Trans-Hudson Corp.*, 695 F. Supp. at 126-27.

[5] As was argued to the appellate courts after trial, in an issue to be resolved on remand should this Court reverse the judgment below, that decision took an unduly broad view of

(continued...)

Respondent then moved – still prior to trial – to dismiss the action on the ground that the claim was a dispute subject to RLA preemption. The trial court denied that motion.

Petitioner had opposed the summary judgment motion by promising to prove at trial, *inter alia*, that Hirsh "did not follow company policy" in making his alleged accusation, and that his "behavior . . was an arrogant abuse of his power as a supervisor . . . . It was reckless in the extreme to make such accusations without legitimate grounds." (A 56) Then, in opposition to the preemption motion, petitioner promised (A 184) that to support her claim that respondent acted with malice,

> [she would] present the following evidence to show that the defendant acted with reckless disregard of her rights: . . . [that Hirsh] made accusations without possessing significant training or experience which would enable him to make such a determination; [and] contravened his company's own policies . . . .

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[5](...continued)
petitioner's ability to overcome the privilege inconsistent with the New York Court of Appeals' decision in *Liberman v. Gelstein*, 80 N.Y.2d 429 (1992), rendered after the decision in *Harris I*. Harris submitted no evidence showing that Hirsh acted out of spite or ill-will, and she explicitly admitted that she had no reason to believe that Hirsh disliked her prior to or at the time of the discussion. (A 579-80) Nor could the jury properly have found, from the only evidence Harris offered – testimony that he had asked two subordinates for their opinion as to whether Harris used drugs prior to the July 16, 1986 meeting, and that they had responded that they did not believe she did (A 371-72; 666-67; 686-88) – that Hirsh knew that his alleged statement was false, or that he "in fact entertained serious doubt as to" its truth. *Liberman*, 80 N.Y.2d at 438. As a supervisor with many years of experience in evaluating employees, Hirsh was entitled to rely upon his own personal observations of Harris and her work performance.

And petitioner fulfilled these promises: at trial, in order to carry her burden of proving malice, she offered three trial exhibits, all of which related solely to rights and obligations under the collective bargaining agreement: (1) the substance abuse policy itself, which has been deemed part of the collective bargaining agreement (A 326-26); (2) a letter requesting a hearing concerning the alleged slanderous statement pursuant to Rule 52 of her collective bargaining agreement (A 558); and (3) the letter by which she was subsequently informed that her position (and others) had been abolished. (A 587-88)

Given the issues and proof at trial, as framed and presented by petitioner, the jury's verdict can only be understood as deciding – contrary to Metro-North's view of its bargained-for agreement – that Metro-North needed some quantum of suspicion in order to closely question an employee concerning drug use, even in an informal and private meeting with supervisors.

On appeal from judgment upon the jury's verdict, the intermediate appellate court held that Hirsh's motion to dismiss on grounds of RLA preemption should have been granted.

*(b) The New York Court of Appeals' Decisions:* On petitioner's appeal to the New York Court of Appeals, respondent argued that petitioner's claim was subject to the exclusive jurisdiction of the grievance-to-arbitration provisions of the RLA, which he urged was broader than the test for preemption pursuant to Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, set forth by *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 405-06 (1988), and *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985). Alternatively, respondent argued that the claim was preempted under the *Lueck/Lingle* standard.

The Court of Appeals unanimously affirmed dismissal of the action. Its opinion invoked the broader RLA standard subsequently rejected in *Hawaiian Airlines, Inc. v. Norris*, ___ U.S. ___, 114 S.Ct. 2239 (1994), but also made clear (*see generally* Pet. 8a-9a) that petitioner's claim was preempted even if the

*Lueck/Lingle* standard applied, as it was substantially dependent on the CBA and indeed was a "disguised contract claim":

- "At the time of the alleged slander, plaintiff was being interviewed regarding her work performance and her possible violation of the substance abuse policy. Thus, the alleged tortious conduct was 'inextricably intertwined' with a work-related investigation that defendant Hirsh was authorized to undertake by the terms of the CBA . . .";
- "Adjudication of plaintiff's State tort claim would have been impossible without reference to conduct governed by the [CBA] since, in rendering its verdict, the jury here was required to specifically determine whether defendant's conduct was qualifiedly privileged under the labor contract and whether he exceeded the scope of that privilege";
- "In finding that defendant did not have the authority under the [CBA] to engage in the exchange with plaintiff in the manner that he did, the jury had to second-guess whether defendant Hirsh conducted the investigation of plaintiff within the dictates of the labor agreement";
- Since "the terms of the Metro-North substance abuse policy authorize a supervisor to proceed with an employee substance abuse investigation by relying 'solely on evidence of . . . personal observations, . . .' plaintiff's theory that defendant's reliance upon his own observations here constituted malice could well be seen as unsustainable in light of the terms of the agreement which permit such conduct"; and
- "The trial record also supports defendant's contention that plaintiff's tort action constituted a preempted 'disguised' contract claim . . . plaintiff interjected into the litigation the claim that she was 'unjustly treated' and ultimately 'forced out' of her position – matters

entrusted to the sole jurisdiction of the adjustment board under the RLA."

Petitioner promptly sought reargument when this Court handed down *Hawaiian Airlines* two weeks after the decision of the Court of Appeals. After receiving respondent's opposition, which demonstrated at length that (as respondent had earlier argued) the *Lueck/Lingle* standard was met, the Court of Appeals denied reargument.

## REASONS FOR DENYING THE WRIT

Petitioner has asked this Court to grant the writ and either (a) vacate and remand for consideration in light of *Hawaiian Airlines* or (b) resolve a purported "deep-seated conflict" over the proper scope of federal labor preemption. Neither argument justifies granting the requested writ. The New York Court has already had an opportunity to consider whether its judgment was consistent with *Hawaiian Airlines*, and there is no conflict insofar as cases such as this are concerned, so that this case provides no occasion for exploring the conflict petitioner perceives.

### A. The Court of Appeals Considered and Its Decision is Fully Consistent With *Hawaiian Airlines, Inc. v. Norris*

1. The New York Court of Appeals has already given "due deliberation" (Pet. 20a) to petitioner's argument that *Hawaiian Airlines* required reversal of its decision in this case. Thus, there is absolutely no basis for petitioner's suggestion that this Court should grant the writ, vacate the judgment below, and remand for reconsideration in light of *Hawaiian Airlines*. Doing so might have been appropriate had the petitioner come directly to this Court instead of moving the state court for reargument, but that was not the course petitioner chose.[6]

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[6] Plaintiff's motion for reargument was filed on July 9, 1994, and was met by a brief in opposition on July 22 and additional letter-briefing. The Court of Appeals had more than two

(continued...)

2. In any event, as respondent explained to the Court of Appeals and as that Court's opinion demonstrates, respondent's pre-trial motion to dismiss on the jurisdictional preemption ground was plainly meritorious even under the *Lueck/Lingle* standard applied to RLA cases by *Hawaiian Airlines*, because the petitioner's arguments on the motion made clear that resolution of her claim depended on the reach of respondent's authority under the CBA. As petitioner's own presentation of her claim required interpretation of the CBA, it is clearly preempted by the settled core of *Lueck* and *Lingle*. Thus, this is not an appropriate case to test the outer reaches of the *Lueck/Lingle* doctrine.[7]

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[6](...continued)
months to deliberate on the motion for reargument predicated on *Hawaiian Airlines* before it denied the motion on September 29, 1994. (Pet 20a)

[7] In this regard, we note petitioner's error in arguing against preemption by relying upon the jury's implicit conclusion that Hirsh acted with either common law or actual malice (*see* Pet. 13) and upon "facts" that were in sharp dispute and not established until the final verdict (*see* Pet. 3-4). Whether the pre-trial preemption motion should have been granted should be analyzed in light of the pleadings and arguments then available, not by the record later made at a trial that had not yet occurred (and if the action were properly one for the RLA adjustment boards, should never have occurred). *Cf. Horton v. Liberty Mutual Ins. Co.*, 367 U.S. 348 (1961) (diversity jurisdiction rests on amount which at the outset appears likely to be at issue); *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 289-90 (1938) (subsequent reduction in amount in controversy irrelevant to jurisdiction); *Johnson v. United States*, 333 U.S. 10, 16-17 (1933) (arrest made without probable cause cannot be justified by fruits of arrest itself); *Whitely v. Warden*, 401 U.S. 560, 564-65 (1971) (validity of arrest or search warrant turns on evidence before magistrate at time of application).

(continued...)

As *Hawaiian Airlines* reaffirmed, and as *Lueck* and *Lingle* had earlier made clear, "where the *resolution* of a state-law claim depends on an interpretation of the collective-bargaining agreement, the claim is pre-empted." 114 S.Ct. at 2248 (emphasis added); *see also Lingle*, 486 U.S. at 405-06; *Lueck*, 471 U.S. at 220.

In *Lueck*, this Court held preempted an employee's state law action for bad-faith mishandling of his disability claim. In that case the manner of handling such claims was not even expressly addressed in the collective bargaining agreement. However, the Court noted that the parties could have bargained about what would constitute "reasonable performance" of their obligations with respect to disability claims, and "[t]he parties' agreement as to the manner in which a benefit claim would be handled will necessarily be relevant to any allegation that the claim was handled in a dilatory manner." 471 U.S. at 218. The state claim was thus "substantially dependent" upon analysis of the terms of the collective agreement and was held preempted. 471 U.S. at 220-21.

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[7](...continued)

If events at trial are to be considered, we further note that various "facts" set out in the petition, including petitioner's description of her use of the CBA at trial as "incidental," are entirely inaccurate – indeed, the Court of Appeals concluded that the trial record supported the view that petitioner's claim was in actuality a disguised contract claim (Pet. 9a), meaning the contract, *i.e.*, the CBA, could not have been incidental. Petitioner's contention that respondent did not rely at trial on the Metro-North drug policy embodied in the CBA to defend against plaintiff's claim is similarly inaccurate (*see* Pet. 3a), and, moreover, is beside the point. In contending that respondent had never read Rule G and did not knowingly rely on it, petitioner herself argued that respondent had acted outside of his authority, and it was thus petitioner who brought the issue of the reach of the CBA before the jury. (Pet. 8a)

In *Lingle*, by contrast, the Court concluded that plaintiff's retaliatory discharge claim was not preempted because resolution of the claim turned on "purely factual questions" about conduct and motive that did not require interpretation of any term of a collective bargaining agreement. 486 U.S. at 407.

*Hawaiian Airlines* reaffirmed *Lueck*'s holding that common law claims against employers arising in the workplace *are* preempted where – as here – "the duties the employer owed the employee . . . were rooted firmly in the collective-bargaining agreement," or where "any attempt to assess liability . . . inevitably will involve contract interpretation." *Hawaiian Airlines*, 114 S.Ct. at 2247-48 (quoting *Lueck*, 471 U.S. at 218).[8]

In the course of implicitly accepting respondent's argument that petitioner's claim was subject to preemption under *Lueck*, the New York Court observed that "[t]he substance of [Harris'] claim is that [respondent] falsely accused her of drug use during the July 16 meeting and *failed to comply with the negotiated policies and procedures governing such inquiries.*" (Pet. 8a, emphasis added) Petitioner's claim:

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[8] As petitioner recognizes (Pet. 16), *Livadas v. Bradshaw*, ___ U.S. ___, 114 S. Ct. 2068 (1994), decided shortly before *Hawaiian Airlines*, likewise emphasized that federal preemption is required wherever necessary to assure that the purposes of the labor laws are not frustrated by "state laws purporting to determine 'questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement,' *Lueck*, 471 U.S., at 211, 105 S.Ct., at 1911, or by parties' efforts to renege on their arbitration promises by 'relabeling' as tort suits actions simply alleging breaches of duties assumed in collective-bargaining agreements, *id.*, at 219, 105 S. Ct., at 1915; *see Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652, 85 S. Ct. 614, 616, 13 L. Ed. 2d 580 (1965)." *Livadas*, 114 S. Ct. at 2078.

> 'in essence and substance' concerned the application or interpretation of company rules embodied in Metro North's CBA. . . . Adjudication of plaintiff's State tort claim would have been impossible without reference to conduct governed by the collective bargaining agreement since, in rendering its verdict, the jury here was required to specifically determine whether defendant's conduct was qualifiedly privileged under the labor contract and whether he exceeded the scope of that privilege.

(Pet. 8a, citations omitted) The Court then stated, in a finding congruent with the determination in *Lueck*, that the jury's verdict "trespassed upon the exclusive authority of the adjustment board to determine the manner in which an employer may enforce company policies" (Pet. 8a), since it would necessarily inhibit (indeed, preclude) Metro-North from exercising the very contractual authority it believes it has under Rule G. To the extent Metro-North's interpretation of its authority to have its supervisors question employees about on-the-job drug use is incorrect, Congress has decreed that it is an adjustment board under the RLA – and not any jury or judge – that should decide whether or not Metro-North's managers may continue to implement Rule G as respondent implemented it.

The Court of Appeals' assessment that resolution of petitioner's claims depended on the CBA was well-founded. The centerpiece of petitioner's opposition to the pre-trial preemption and summary judgment motions (and at trial) was her contention that respondent had not followed Metro-North's policy, and was not authorized to act as he did. *See* pp. 4-5 above. It should have been apparent to the motion court that in considering whether petitioner met her burden of proving malice (fault), the jury would inevitably have to assess and construe the scope of the employer's authority to question employees as respondent did. The burden of proving that the respondent acted with either common law or actual malice rested with petitioner, and she proposed to carry that

burden by showing that the respondent "contravened his company's own policies" (A 184), *i.e.*, the CBA.[9]

Other RLA preemption decisions applying the *Lueck/Lingle* test, which were cited to the New York Court of Appeals on the main appeal, confirm that petitioner's claim is preempted under that standard. *See, e.g., Melanson v. United Airlines, Inc.*, 931 F.2d 558, 562 n.3, 563 (9th Cir.), *cert. denied*, ___ U.S. ___, 112 S. Ct. 189 (1991) (claim for fraudulent misrepresentation preempted under *Lingle*); *Beard v. Carrollton R.R.*, 893 F.2d 117, 122 (6th Cir. 1989) (claims for intentional infliction of emotional distress and wrongful interference with contract preempted under *Lingle*); *Edelman v. Western Airlines, Inc.*, 892 F.2d 839, 844 (9th Cir. 1989) (variety of tort claims preempted under *Lingle*). *See also Henegar v. Banta*, 27 F.3d 223, 226-27 (6th Cir.) (presented to the Court of Appeals in opposition to petitioner's reargument motion; defamation claim preempted under *Lingle*), *cert. denied*, ___ U.S. ___, No. 94-503, 1994 WL 528130 (1994).

These cases demonstrate that resolution of claims based on employer statements or actions during a routine investigation

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[9] Even though petitioner's union never obtained at the bargaining table a provision limiting the extent to which employees would be questioned about drug use or informally accused during questioning absent probable cause, a judgment upholding the verdict would have precisely that effect and would essentially prohibit Metro-North from using the contractual authority it believes it has bargained for when dealing with employees in New York State. Notably, however, and as discussed in greater detail below (at 17-19), that interpretation would only apply in New York, meaning that Metro-North managers in Connecticut could have different authority in applying Rule G, in contravention of the general federal labor policy of promoting uniformity in the interpretation of collective bargaining agreements and the need for uniform substantive standards so that multistate railroads can be efficiently and safely operated.

undertaken pursuant to the terms of a collective bargaining agreement will typically, if not invariably, require analysis of whether the statements fell within the parameters of the employer's authority under the agreement, as was required by the claim here.[10] By contrast, the question in *Hawaiian Airlines* and in the other retaliatory discharge cases is whether the discharge was retaliatory *independent* of any reason or "just cause" for the discharge under the collective bargaining agreement - *i.e.*, the sole issue is the employer's motivation, regardless of what the CBA allowed. *See, e.g., Hawaiian Airlines*, 114 S.Ct. at 2248, 2251; *Anderson v. American Airlines, Inc.*, 2 F.3d 590, 596 (5th Cir. 1993); *Davies v. American Airlines Inc.*, 971 F.2d 463, 466-67 (10th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2439 (1993); and *Maher v. New Jersey Transit Rail Operations, Inc.*, 125 N.J. 455, 472-73, 593 A.2d 750, 758 (N.J. 1991).

*Maher*, 593 A.2d at 758, which this Court cited with approval in *Hawaiian Airlines*, makes the above distinction clear. In that case, the Supreme Court of New Jersey relied on *Lingle* in holding that a claim for disability discrimination *was* preempted, while at the same time reaching a different conclusion for a retaliatory discharge claim based on the New Jersey whistleblower statute. 593 A.2d at 760 (citations omitted). The employer's defense to the discrimination claim involved the need to comply with a safety rule, and thus resolution of that claim required interpretation of the collective bargaining agreement. *Maher*, 593 A.2d at 763. *See also O'Brien v. Consolidated Rail Corp.*, 972 F.2d 1, 5-6 (1st Cir. 1992), *cert. denied*, ___ U.S.___, 113 S.Ct. 980 (1993) (cited with approval in *Hawaiian Airlines*).

As the New York Court of Appeals recognized in denying reargument, the *Lueck/Lingle* standard applied in *Maher* and in

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[10] As repeatedly noted, petitioner invoked the CBA in her papers opposing respondent's motions to dismiss on RLA preemption grounds and for summary judgment on qualified privilege grounds, contending that Hirsh had acted in contravention of the authority provided by Rule G.

numerous other cases easily resolves this case without the need for further refinement. Here, as in *Maher*, resolution of petitioner's claim "depends upon" an interpretation of the employer's powers under the collective bargaining agreement, and in

> finding that defendant did not have the authority under the collective bargaining agreement to engage in the exchange with plaintiff in the manner that he did, the jury had to second-guess whether defendant Hirsh conducted the investigation of plaintiff within the dictates of the labor agreement. In so doing, the jury necessarily trespassed upon the exclusive authority of the adjustment board to determine the manner in which an employer may enforce company policies.

(Pet. 8a) In short, the Court of Appeals' judgment is fully consistent with *Hawaiian Airlines*.

**B. This Case Will Not Resolve Any Perceived Circuit Conflict As Petitioner's Claim Is Preempted Regardless Of The Outer Parameters of the *Lueck/Lingle* Standard**

1. This case does not provide an appropriate occasion to resolve any perceived conflict concerning the scope of the *Lueck/Lingle* standard. Given petitioner's conceded intention to meet her evidentiary burden by proving that her supervisor "contravened his company's own policies" and exceeded "his power as a supervisor" (*see* pp. 4-5 above), her claim is preempted under the narrowest reading of the *Lueck/Lingle* standard suggested by any appellate court.

Indeed, courts applying *Lueck* and *Lingle* to RLA and non-RLA defamation claims by employees against employers based on work-related speech, both before and after *Hawaiian Airlines*, have consistently agreed that such claims are preempted, because in all such cases the petitioner has the burden of proving fault and in that regard will usually – *as petitioner promised to do here* – contend that the defendant acted outside

the scope of any contractually authorized workplace investigatory power. These cases closely parallel the tort claim in *Lueck*, since their resolution is "substantially dependent upon analysis of the terms of" collective-bargaining agreements, 471 U.S. at 220.[11]

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[11] The RLA cases cited to the New York Court of Appeals holding employee workplace-related defamation claims preempted are discussed at p. 12 above. The many non-RLA cases respondent cited to that Court holding similar claims preempted under the *Lingle/Lueck* standard include *DeCoe v. GMC*, 32 F.3d 212, 217 (6th Cir. 1994) (defamation claim preempted as plaintiff's claim presupposed a duty "incompatible with that established by the CBA"); *Mock v. T.G. & Y. Stores Co.*, 971 F.2d 522, 530 (10th Cir. 1992) (state tort claims, including defamation, preempted under *Lingle* test where claims arose from manner in which employer conducted investigation of suspected employee misconduct); *Bagby v.* GMC, 976 F.2d 919, 921-22 (5th Cir. 1992) (claims for defamation and intentional infliction of emotional distress preempted under *Lingle* where claims asserted that acts taken pursuant to suspension and investigation procedures were tortious by the mere fact that other employees learned of them; cannot use state tort system to prohibit employers from investigating employee misconduct); *McCormick v. AT&T Technologies, Inc.*, 934 F.2d 531, 535-37 (4th Cir. 1991) (claims for infliction of emotional distress stemming from employer cleaning out employee's locker preempted under *Lingle* because claims could not be determined without reference to collective bargaining agreement, which governed employer's authority to take such action), *cert. denied*, ___ U.S. ___, 112 S. Ct. 912 (1992); *Barbe v. Great Atl. & Pac. Tea Co.*, 722 F. Supp. 1257, 1260-63 (D.Md. 1989) (defamation claim arising from dissemination of termination letter preempted under *Lingle*), *aff'd*, 940 F.2d 651 (4th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 939 (1992).

(continued...)

There is thus no conflict in the circuits with regard to preemption of defamation claims brought by employees against managers concerning speech uttered in the course of workplace investigations. Indeed, none of the cases to which petitioner approvingly points denies preemption to defamation claims against managerial employees under either the RLA or the LMRA. To the contrary, even the Sixth Circuit, to which petitioner points as having the narrowest, most "claim-centered" analysis, has twice since *Hawaiian Airlines* held defamation claims like the one here preempted under the *Lueck/Lingle* test. *See Henegar v. Banta*, 27 F.3d at 226-27; *DeCoe v. GMC*, 32 F.3d at 217.

The reason for this is simple: resolution of virtually all defamation claims brought by employees against managerial personnel based on managerial speech arising in the course of workplace investigations will depend upon whether employer speech is authorized by the CBA, since the employee-plaintiffs will in most if not all jurisdictions (and certainly in New York[12]) have the burden of proving an unprivileged publication, *e.g.*, fault sufficient to defeat privilege. The claims in such cases will thus not merely involve historical facts, but rather will "depend on" the scope of managerial authority afforded in the collective bargaining agreement.

The burden on plaintiffs to prove fault was recognized by the authors of the influential Restatement, Second, Torts (1977) years ago, when they defined the elements of defamation in § 558 to include "an unprivileged publication to a third party." Whether the cases follow that approach and refer to unprivi-

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[11](...continued)

Significantly, then, the First, Third, Fourth, Fifth, Sixth, Eighth, Ninth and Tenth Circuits *agree* that tort claims such as that pressed here are preempted under the *Lueck/Lingle/ Hawaiian Airlines* standard.

[12] *Liberman v. Gelstein*, 80 N.Y.2d at 437-38.

leged publication as an element of the tort itself,[13] or whether they speak in terms of privilege as a defense[14] is of no moment, since in all such cases the plaintiff has the burden of defeating the privilege, once it is found presumptively to apply. Thus, regardless of the verbal formulation used, the result is precisely the same: plaintiffs in such workplace defamation cases uniformly shoulder the burden of attempting to defeat the qualified privilege.

Because New York gives plaintiffs the burden of proving that the privilege has been exceeded, and because that allocation will usually (as it did here) lead plaintiffs to prove that any managerial authority afforded by the CBA was exceeded or violated (as petitioner contended below), even the most resolutely "claim-centered" approach to preemption will usually, if not invariably, result in preemption, as recognized by the repeated holdings that employee defamation claims against managerial employees arising out of workplace investigations are subject to resolution under the RLA grievance machinery.

2. The standard urged by petitioner has not been applied in cases like this precisely because it would lead to arbitrary results in contravention of the bedrock principle of federal labor preemption – uniformity in the interpretation of collective bargaining agreements. As this Court first stated in *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962) (and quoted in *Lueck*, 471 U.S. at 210 and again in *Lingle*, 486 U.S. at 404):

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[13] *See, e.g., Angio-Medical Corp. v. Eli Lilly & Co.*, 720 F. Supp. 269, 272 (S.D.N.Y. 1989); *Greene v. Alberle*, 150 Misc.2d 306, 308 (Sup. Ct. Suffolk Co. 1991). *See also Decoe*, 32 F.3d at 217 (6th Cir. 1994) (Michigan law); *Strada v. Connecticut Newspapers, Inc.*, 193 Conn. 313, 316 (1984); and *Lent v. Huntoon*, 143 Vt. 539 (1983).

[14] *See, e.g., Norwood v. City of New York*, 203 A.D.2d 147 (1st Dep't), *appeal dismissed without op.*, 84 N.Y.2d 849 (1994).

> The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. *Once the collective bargain was made, the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation* . . . .

369 U.S. at 103-04 (emphasis added).

But conflicting interpretations of collective bargaining agreements is exactly the result that would be obtained were petitioner's formulation the test for labor preemption. The "claim-centered" standard as described by petitioner would remit employees covered by collective bargaining agreements to adjustment boards in states where "unprivileged publication" is the verbal formulation used for a defamation claim, while employees in other states subject to the same agreements with the same standards would nonetheless have recourse to state courts on state defamation claims. Such an erroneous distinction has not been adopted by any circuit.

Such disparate results would be particularly unjustifiable in the context of the RLA, where Congress has emphasized the importance of uniform substantive standards so that multistate railroads can be efficiently and safely operated. *See, e.g., Pennsylvania R.R. v. Day*, 360 U.S. 548, 552-53 (1959). In the RLA context, petitioner's test would also invoke a host of potential choice-of-law issues because railroad employees often spend their working time in more than one state, meaning that preemption could depend on the *situs* of the tort. Allowing state law claims in these circumstances would result

in exactly the "unpredictable medley of jury determinations, which Congress, in its quest for national uniformity" has sought to avoid in the railroad industry. *Rayner v. Smirl*, 873 F.2d 60, 66 (9th Cir. 1989) (construing the whistleblower provisions of the Federal Railroad Safety Act to preempt a state action for wrongful discharge).

In sum, petitioner's proposed standard makes no sense in the context of this case, has not been adopted in any circuit, and provides no occasion for this Court to revisit the same ground it only recently covered in *Hawaiian Airlines*.

3. Petitioner's citation of cases from the Sixth and Tenth Circuits at 11-12 of the petition for the spurious proposition that those circuits take a strictly claim-centered view of LMRA preemption inconsistent with preemption of defamation claims ignores the distinction between *removal*, which bases federal question jurisdiction on the "well-pleaded complaint rule," and preemption, which asks whether resolution of the plaintiff's case will require interpretation of the CBA (regardless of whether or not the complaint itself mentions the CBA). As this Court explained in *Caterpillar Inc. v. Williams*, 482 U.S. 386 (1987), an employer's invocation of the CBA by way of defense may be sufficient to warrant a state-court finding of LMRA preemption even though it is not sufficient to warrant removal to federal court:

> It is true that when a defense to a state claim is based on the terms of a collective bargaining agreement, the state court will have to interpret that agreement to decide whether the state claim survives. But the presence of a federal question, even a § 301 question, in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule – that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court.

482 U.S. at 398-99; *see also id.* at n. 13.

Petitioner ignores the Sixth and Tenth Circuit cases finding defamation claims involving managerial workplace speech arising in the course of investigations preempted under the *Lingle/Lueck* standard (*see Henegar, DeCoe,* and *Mock,* all cited *supra* at 15-16), and has not shown that any circuit now employs her suggested rule except to determine removal. Indeed, the only Tenth Circuit case cited by petitioner as allegedly refusing to predicate LMRA preemption on a CBA-related defense – *United Ass'n of Journeymen & Apprentices, Local No. 57 v. Bechtel Power Corp.*, 834 F.2d 884, 889 (10th Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988) – decided a removal issue, relied on *Caterpillar*, and presents nothing more than a garden variety application of the familiar well-pleaded complaint rule of *Gully v. First Nat'l Bank*, 299 U.S. 109 (1936). More recent Sixth Circuit decisions than the ones cited by the petitioner agree that "preemption and removal are related but distinct concepts. Even 'the fact that a defendant might ultimately prove that a plaintiff's claims are pre-empted . . . does not establish that they are removable to federal court.'" *Tisdale v. United Ass'n of Journeymen & Apprentices, Local 704*, 25 F.3d 1308, 1311 (6th Cir. 1994) (citing *Caterpillar*, 482 U.S. at 398).[15] Removal principles obviously have no application to the state court's finding of preemption in this case.

Just last term, the Court noted that "[W]here the *resolution* of a state-law claim depends on an interpretation of the collective-bargaining agreement, the claim is pre-empted." *Hawaiian Airlines*, 114 S.Ct. at 2248 (emphasis added), citing *Lingle*, 486 U.S. at 405-406, and *Lueck*, 471 U.S. 202. Nothing in

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[15] To the extent that *O'Shea v. Detroit News*, 887 F.2d 683 (6th Cir. 1989) does not purport to hinge on removal principles, it stands only for the proposition that a proffered CBA-based defense will not result in preemption where it is irrelevant to resolution of the claim. In *O'Shea*, as in *Lingle* and *Hawaiian Airlines*, discussed at pages 9-10 above, the court found that the relevant issue before the factfinder would be only what the employer's motivation was, not what the CBA allowed.

the petition or the New York Court of Appeals' decision suggest any need to revisit this issue.

## CONCLUSION

For all the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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